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85-787

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RUSSELL D. DAVES,
Appellant,

v.

THE STATE BAR OF TEXAS,
Appellee.

ON APPEAL TO THE COURT OF APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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November 6, 1985

CASILLAS PRESS INC - 1717 K STREET NW, WASHINGTON DC - 223-1220

QUESTION PRESENTED*

May a state, consistent with the First Amendment, discipline an attorney for publishing a newspaper advertisement offering to handle routine, uncontested divorces at fixed fees, in language virtually identical to that approved by this Court in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), solely because the attorney did not include in his advertisement the statement that he was "Not certified by the Texas Board of Legal Specialization" as an expert in family law?

*There are no parties to this proceeding other than those listed in the caption.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-

RUSSELL D. DAVES,
Appellant,

v.

THE STATE BAR OF TEXAS,
Appellee.

ON APPEAL TO THE COURT OF APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Order of the Supreme Court of Texas refusing appellant's petition for a writ of error, issued on September 11, 1985, is set forth in Appendix A (App. 1a) and is not reported. The opinion of the Court of Appeals for the Seventh Supreme Judicial District of Texas is set forth in Appendix B (App. 3a-13a) and is reported at 691 S.W.2d 784. The orders of the District Court for Lubbock County, Texas Judicial District 237, are set forth in Appendix C (App. 14a-17a) and are not reported.

JURISDICTION OF THIS COURT

This is an appeal from a final order disciplining an attorney for placing a newspaper advertisement. Appellant challenges the validity of Disciplinary Rule 2-101(C)(2) of the Rules Governing the State Bar of Texas issued by the Supreme Court of Texas, Tex. Rev. Civ. Stat. Ann. art. 320a-1 *et seq.* (Vernon's Supp. 1985), on the ground that the Rule violates the First Amendment to the United States Constitution. The order of the Supreme Court of Texas was entered on September 11, 1985 (App. 1a), and notices of appeal were filed on October 30, 1985 in the Supreme Court of Texas and in the Court of Appeals for the Seventh Supreme Judicial District of Texas, which has possession of the record (App. D, 18a-21a). Because 28 U.S.C. § 2403(b) may be applicable, a copy of each of the notices of appeal was served on the Attorney General of Texas. *See* Rule 28.4(c) of the Rules of this Court. Jurisdiction is based on 28 U.S.C. § 1257(2). If the Court determines that an appeal is not proper in this case, it is respectfully requested that the papers be treated and acted on as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103.[1]

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[1]Because the Supreme Court of Texas refused to hear appellant's petition for a writ of error, appellant has styled this appeal as one from the Court of Appeals for the Seventh Supreme Judicial District of Texas, which was the highest state court to review appellant's case on the merits. *Cf.* Rule 483, Texas Rules of Procedure. However, because of the ambiguities which inhere in the discretionary review procedures of the Supreme Court of Texas, appellant filed notices of appeal with both courts. If this Court concludes that this appeal should be taken from the Supreme Court of Texas, appellant requests that this jurisdictional statement be treated as an appeal from that court.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The pertinent provision of the Rules Governing the State Bar of Texas (the "Rules") provides that an attorney advertising a legal service in a particular area of law:

> Who has not been awarded a Certificate of Special Competence by the Texas Board of Specialization in the area so advertised must state with respect to each area, "Not certified by the Texas Board of Legal Specialization." Where the area so advertised has not been designated as an area in which a lawyer may be awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer may also state, "No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area." Such statements must be displayed conspicuously so as to be easily seen or understood by any consumer.

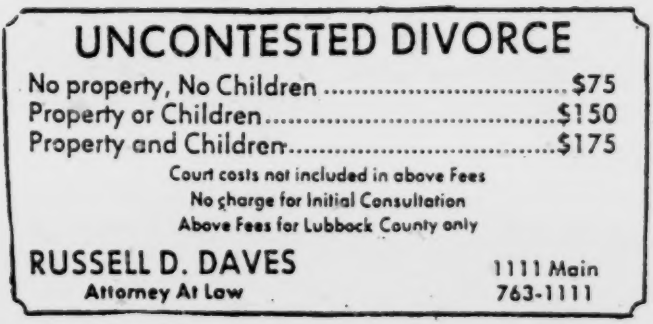
Rules Governing the State Bar of Texas, Art. X, § 9 (Code of Professional Responsibility) DR 2-101(C)(2) (Vernon's Supp. 1985).

STATEMENT OF THE CASE

This appeal challenges the finding of misconduct against appellant for placing a newspaper advertisement indicating his availability to handle routine, uncontested

divorces at fixed fees, solely because he did not include in the advertisement the statement that he was "Not certified by the Texas Board of Legal Specialization" as an expert in family law. The facts giving rise to this case are not in dispute and will be summarized briefly.

Appellant graduated from law school in 1977, and since then he has been engaged in the general practice of law in Lubbock, Texas. A major component of appellant's practice has been in family law, primarily routine uncontested divorces. Texas has enacted a "no-fault" divorce law, which makes available simple procedures for obtaining an uncontested divorce. *See* Tex. Fam. Code Ann. § 3.01 *et seq.* (Vernon's 1975). In an effort to attract clients and to provide information relating to the very low fees that he charges for handling such cases, appellant placed the following advertisement in the *Lubbock Avalanche Journal* on October 27, 1983:


UNCONTESTED DIVORCE

No property, No Children $75
Property or Children $150
Property and Children $175

Court costs not included in above Fees
No charge for Initial Consultation
Above Fees for Lubbock County only

RUSSELL D. DAVES
Attorney At Law

1111 Main
763-1111

Appellant had run the same advertisement on a daily basis for a number of years without any disciplinary charges being brought.

Shortly after the October 27 advertisement appeared, a lawyer who had seen it filed a complaint with the Grievance Committee of the appellee State Bar of Texas alleging

that appellant's advertisement failed to include the statement of non-certification required by the 1982 amendment to Texas DR 2-101(C)(2). After a brief administrative proceeding, the State Bar filed a complaint in the District Court for Lubbock County, 237th Judicial District, which charged appellant with violating DR 2-101(C)(2). Appellee sought to have Mr. Daves reprimanded, suspended, or disbarred from practice.[2]

Appellant filed an answer which raised a First Amendment defense, and the State Bar promptly moved for summary judgment. The Bar argued that the requirement that lawyers prominently display a statement of non-certification in all advertising passed constitutional muster because it was needed to assure that the public was not misled. Specifically, the Bar's memorandum claimed that "the ordinary consumer might reasonably believe that the defendant exclusively takes such cases and that he has most likely developed a high degree of expertise in this area." The statement of non-certification, the Bar contended, informs the public that "objective professional standards exist for that area of the law and that the advertising attorney has not yet qualified for certification." In

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[2]Before the disciplinary proceedings were brought, appellant had applied for, and been denied, certification as a specialist in family law. That determination has been appealed, and the matter is still pending before the State Bar. Under the certification process, panels of lawyers in each area of specialization are responsible for setting eligibility criteria and determining whether applicants should be certified. An applicant who is denied certification by the panel may appeal to the State Bar, but not to the Supreme Court of Texas or any other judicial body. To date, even though the certification program in family law has been in operation since 1975, only 389 of the over 40,000 lawyers admitted to practice in Texas have been certified as specialists in family law. Vol. I, No. 22, *The Texas Lawyer*, at 1 (September 11, 1985).

making this argument, the Bar offered no affidavits or other evidence suggesting that consumers in general had been misled by advertising of the sort used by appellant, that any of appellant's clients had been misled in any way by the advertisement, or that the statement of non-certification would have aided consumers in making an informed selection of an attorney to handle an uncontested divorce.

In mounting his defense, appellant relied primarily on the First Amendment. He contended that the statement of non-certification required by DR 2-101(C) violated his right to publish truthful information relating to the nature of the services he offers and the fees he charges. Appellant cited this Court's ruling in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), which approved an advertisement remarkably similar to appellant's. He further argued that the statement of non-certification required by Texas served no legitimate state interest, let alone a compelling one, since it actually misleads consumers by suggesting that non-certified attorneys are not competent to handle uncontested divorce proceedings.

To bolster his arguments, appellant submitted a number of affidavits from clients who had retained him after seeing his advertisement. These affidavits established that the clients would not have understood the statement of non-certification, but instead would have concluded that appellant was not qualified or that he was not properly licensed to handle uncontested divorce cases. Moreover, to counter the State Bar's claim, the affidavits further stated that the advertisement had not led the clients to believe that the appellant exclusively handled uncontested divorces or that he claimed to have a higher degree of expertise in divorce law than other practitioners. Appellant

also submitted affidavits from other attorneys in the Lubbock area attesting to the fact that attorneys who have been certified as specialists in family law charge higher fees than appellant for routine matters such as uncontested divorces.

In a brief order issued on January 28, 1985, the District Court granted the Bar's motion for summary judgment, finding that no material facts were in dispute. The court, which did not address appellant's constitutional claim, ordered appellant suspended from the practice of law for six months, beginning on February 11, 1985, and directed him to notify each of his clients of the suspension (App. 14a). The court later delayed the effective date of the suspension until March 1, 1985, to give appellant time to put his clients' affairs in order (App. 16a).

Appellant promptly appealed to the Court of Appeals of Texas for the Seventh Supreme Judicial District, challenging the District Court's ruling primarily on First Amendment grounds. After briefing and argument, on May 20, 1985, the Court of Appeals affirmed the finding that appellant's advertisement violated DR 2-101(C)(2). In so ruling, however, the court expressly declined to consider the merits of appellant's First Amendment claim, observing that "it is not our function as an intermediate appellate court to nullify or alter" a rule promulgated by the State Supreme Court (App. 10a). However, the court reversed the District Court's imposition of a six-month suspension, concluding "that the punishment is so harsh as to constitute an abuse of discretion." (App. 13a). In accordance with its opinion, the court remanded the case to the trial judge for reconsideration of the sanction which should be imposed.

Following the Court of Appeals' ruling, appellant

sought to have the suspension lifted pending further appellate review. In a brief order issued on May 24, 1985, the Court of Appeals denied appellant's request, on the ground that section 24 of the State Bar Rules, Tex. Rev. Civ. Stat. Ann. art. 320a-1, § 24, expressly forbids the granting of any stay pending appeal to an attorney who has been suspended or disbarred from practice. Appellant thereafter filed a petition with the Supreme Court of Texas requesting that his suspension be lifted pending review by that Court, which was denied on June 26, 1985.[3]

Litigation on the merits proceeded as well, with both sides filing applications for writs of error with the Texas Supreme Court. Appellant reiterated his First Amendment challenge, and appellee argued that the six-month suspension should be reinstated. On September 11, 1985, ten days after appellant completed serving his six-month suspension, the Texas Supreme Court issued a one line order "refus[ing]" both applications with the notation "No Reversible Error." (App. 1a). As a result, no court has yet addressed the constitutionality of DR 2-101(C))(2), even though it was the sole basis for appellant's six-month suspension from the practice of law.

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[3]Appellant recognized the barrier posed by section 24 at the time the District Court issued its ruling. Accordingly, he filed an action, *Daves v. State Bar of Texas,* Civil Action No. CA-5-85-25 in the United States District Court for the Northern Division of Texas (Lubbock Division), pursuant to 42 U.S.C. § 1983, seeking to enjoin enforcement of the suspension order until appellant had exhausted all available avenues of appellate review. Following briefing and argument, the District Court denied appellant's motion on grounds of "comity and judicial economy." Order of February 28, 1985. Appellant thereafter filed a petition for a stay of the suspension with this Court, which was presented to Justice White, and was denied on April 12, 1985 (Docket No. A-770). No relief was sought from the United States Court of Appeals for the Fifth Circuit.

THIS APPEAL PRESENTS AN IMPORTANT QUESTION UNDER THE FIRST AMENDMENT.

In the eight years since its decision in *Bates v. State Bar of Arizona,* 433 U.S. 733 (1977), this Court has revisited the issue of attorney advertising on several occasions. *Zauderer v. Office of Disciplinary Counsel,* 105 S. Ct. 2265 (1985); *In re R.M.J.,* 455 U.S. 191 (1982); *In re Primus,* 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978). Read together, these cases firmly establish that the First Amendment forbids a state from imposing broad restrictions on attorney advertising. Despite their divergent facts, these decisions are based on a recognition that promoting the free flow of information about lawyers' services and fees significantly benefits consumers and serves the interests protected by the First Amendment.

The First Amendment question presented here is substantial. The Texas rule at issue is directly at odds with the decision of this Court in *Bates,* is in conflict with the Court's other attorney advertising decisions, and fails to meet the general test for restrictions on commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557 (1980) ("*Central Hudson*"). If allowed to stand, the Texas rule may well signal to other states that *Bates* and its progeny can be circumvented by imposing burdensome "disclaimer" requirements that prevent advertising just as effectively as broad bans.

At the outset, it is essential to recall what prior decisions of this Court have expressly authorized in the area of lawyer advertising. In *Bates,* this Court held that lawyers must be permitted to advertise the fees they charge for certain "routine" services — including uncontested divorces. 433 U.S. at 372. The Court concluded that this sort of

price advertising is not "inherently" misleading, and therefore cannot be prohibited on that basis. *Id.; see also In re R.M.J.*, 455 U.S. at 372; *Zauderer,* 105 S. Ct. at 2276 n. 9. In *In re R.M.J.*, the Court held that a lawyer must be permitted to advertise the areas of the law in which he practices, provided that the lawyer's description is not misleading. 455 U.S. at 205. And in *Zauderer,* the Court affirmed the principle that non-deceptive advertising designed to attract clients who have specific legal problems is protected under the First Amendment. The Court also held that a state cannot restrict the use of illustrations in advertising for legal services, unless it can show that consumers will be misled. 105 S. Ct. at 2278-81.

Against this backdrop, it is clear that appellant's advertising falls well within the category of protected speech defined by the Court's prior decisions. As even a cursory comparison makes clear, appellant's advertisement, in both form and substance, is not materially different than the one this Court approved in *Bates. Compare* Appellant's Advertisement, *supra* at 4, with *Bates*, 433 U.S. at 385. Indeed, by any appropriate measure, appellant's advertisement is less vulnerable to challenge than the one at issue in *Bates.* Appellant's advertisement is entirely factual in nature and contains none of the subjective, self-promotional language, such as "Legal Services At Reasonable Rates," that troubled several members of the Court in *Bates.* 433 U.S. at 386 (Burger, C.J., concurring in part, dissenting in part), *id.* at 394-95 (Powell, J., concurring in part, dissenting in part). Accordingly, since the Texas rule cannot be reconciled with this Court's ruling in *Bates,* this case raises substantial First Amendment questions that warrant consideration by this Court.

Review by this Court is also required because the Texas rule is not reasonably related to advancing an important governmental interest. Following this Court's decision in *Zauderer,* there can be no question that lawyer advertising "may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." 105 S. Ct. at 2275, *citing Central Hudson,* 447 U.S. at 566. In the Texas courts, appellee sought to justify the rule by claiming that the non-certification statement is necessary because advertisements such as appellant's, which focus on only one practice area, suggest that the attorney "exclusively takes such cases and that he has most likely developed a high degree of expertise in this area" and that the non-certification statement informs the public that "objective professional standards exist for that area of the law and that the advertising attorney has not yet qualified for certification."

There are several serious flaws in the Bar's approach which merit review by this Court. In the first place, the premise of the Bar's argument — that advertising a practice area such as "uncontested divorces" is inherently misleading — has already been squarely rejected by this Court. *Bates,* 433 U.S. at 372-74; *In re R.M.J.,* 455 U.S. at 199. Moreover, while *Bates* and *In re R.M.J.* left open the possibility of state regulation where experience shows that there is in fact confusion on the part of the public, the Bar has pointed to nothing which suggests that the sort of advertising employed by appellant has in fact misled consumers, and the undisputed record in this case demonstrates the contrary.

In fact, Texas has done precisely what this Court has repeatedly said states are forbidden from doing — it has stifled lawyer advertising on the basis of untested and

essentially paternalistic assumptions concerning the ability of the public to understand advertising related to routine legal services. *Bates,* 433 U.S. at 381; *In re R.M.J.,* 455 U.S. at 200 n.11; *Zauderer,* 105 S. Ct. at 2277. It is hard to imagine how anyone could believe that a disclaimer of any sort is necessary for an advertisement that simply recites that an attorney is available to handle uncontested divorce proceedings at a fixed fee. If there is no general presumption that all attorneys are competent to handle uncontested divorce cases, particularly in a state that has a "no-fault" divorce law, then there is no presumption of competence at all attaching to a license to practice law. Absent some showing by the Bar that there are significant problems caused by an even more objective version of the advertisement approved by the Court in *Bates,* states cannot, in effect, override the prior decisions of this Court.[4]

Indeed, the need for this Court's intervention is particularly strong here, since the rule imposed by Texas will actually harm the public. As is evident from the language of the statement of non-certification, and as the unrebutted record in this case shows, the public will not understand the "disclaimer." Consumers will not unreasonably conclude that an attorney who tars himself with the non-certification label is unqualified to handle the legal matters that are the subject of his advertisement. In fact, the Chairman of the Texas Board of Legal Specialization has recently acknowledged that the public might not under-

[4]Certification as a specialist in family law calls for expertise well beyond that required to handle uncontested divorces. In order to be certified, an attorney must demonstrate expertise in a wide range of fields, including criminal law, tort law, taxation, trusts and estates, as well as contested and uncontested divorces. Thus, a lawyer who exclusively handles uncontested divorces cannot quality as a specialist in family law because the attorney would not have the requisite expertise and experience handling cases in the other areas of practice covered.

stand the disclaimer required by DR 2-101(C)(2) or realize how few lawyers have been certified as specialists. Vol. I, No. 22, *The Texas Lawyer,* 1, at 3 (September 11, 1985). As a result, consumers will be dissuaded from consulting non-certified attorneys who advertise, even though the attorneys are able and willing to handle their cases, often on a low-cost basis. Inevitably, the Texas rule will result in a sharp decline in advertising by non-certified lawyers, and, concomitantly, a reduction in cost competition for legal services. Indeed, the only beneficiaries of the Rule are the 389 Texas lawyers who are certified as family law specialists, since they can advertise without fear of competition from their non-certified colleagues, even if they charge higher fees. The ultimate loser, of course, is the Texas consumer.[5]

We recognize that the Court has on a number of occasions suggested that a state may require disclaimers to guard against consumer deception, and that greater disclosure — not an outright prohibition — is the favored remedy. Nonetheless, the Court has repeatedly stressed that even disclosure requirements must be "reasonably related to the State's interest in preventing deception of consumers" in order to be sustained. *Zauderer,* 105 S. Ct. at 2282; *see also id.* at 2285 (Brennan, J., concurring in part and dissenting in part); *In re R.M.J.,* 455 U.S. at 203; *Central Hudson,* 447 U.S. at 564-65; *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 246 (1974). And the Court has warned that "unjustified and unduly bur-

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[5]Mr. Daves' case is not an isolated one. According to one commentator, the State Bar is now bringing a number of enforcement actions to compel strict compliance with DR 2-101(C)(2), and several lawyers have been severely disciplined for violations of the rule. Johnson, *Yellow Pages Legal Ads in Texas: The Complexities of DR 2-101(B) & (C),* 17 St. Mary's Law J. 1, 2-3 nn. 4 & 5 (1985).

densome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer,* 105 S. Ct. at 2282.

Despite the contention of the State Bar, this case does not involve a "disclaimer." To the contrary, the requirement imposed by Texas serves a far different purpose than providing information to the public – it acts as and is intended to act as a significant deterrent, if not an outright prohibition, against advertising. The language mandated by the rule conveys an unmistakable message to consumers – the non-certified lawyer who advertises is not competent and should be avoided. We submit that whatever the Court meant in *Bates, In re R.M.J.* and *Zauderer* about the right of a State to require disclaimers, it did not envision that a rule of this kind would be upheld simply because it is called a disclaimer rather than a ban.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction. Because the Texas rule is in direct conflict with *Bates* and a number of the Court's other rulings, and because no Texas court has yet addressed the constitutional issue, appellant suggests in the alternative that it would be appropriate for the Court to note probable jurisdiction, vacate the decision below, and remand the case to the Supreme Court of Texas for further consideration, particularly in light of the Court's recent decision in

Zauderer. This alternative would guarantee that the Supreme Court of Texas has an opportunity to fully consider the constitutionality of the rule prior to review by this Court.

Respectfully submitted,

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November 6, 1985

APPENDIX

APPENDIX A

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

September 11, 1985

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Lubbock TX 79401

RE: Case No. C-4303

STYLE: THE STATE BAR OF TEXAS
v. RUSSELL D. DAVES

Dear Counsel:

Both applications for writ of error in the above referenced case were this day refused with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk
/s/ _____ *

* A minute order stating that both petitions were "refused, No Reversible Error," was also entered by the Court on September 11, 1985.

APPENDIX B

Russell D. DAVES, Appellant,
v.
The STATE BAR OF TEXAS, Appellee.
No. 07-85-0049-CV.
Court of Appeals of Texas
Amarillo.
May 20, 1985
Rehearing Denied June 4, 1985.

Before REYNOLDS, C.J., and DODSON and COUNTISS, JJ.

REYNOLDS, Chief Justice.

Russell D. Daves, a Lubbock attorney licensed by the Supreme Court of Texas to practice law in this state, was summarily adjudged guilty of an act of professional misconduct, and his license to practice law was suspended for six months. Although the professional misconduct was conclusively established, we conclude that the trial court abused its judicial discretion by excessively disciplining Daves under this summary judgment record. Consequently, we reverse and remand.

Daves was accused by the State Bar of Texas and found guilty by the court of violating DR 2-101, a disciplinary rule of the Texas Code of Professional Responsibility, by advertising his services in an area of family law without stating in the advertisement, as required by DR 2-101(C)(2), that he was "Not certified by the Texas Board of Legal Specialization." The offending advertisement, appearing in this form,

UNCONTESTED DIVORCE

No property, No Children $75
Property or Children $150
Property and Children $175

Court costs not included in above Fees
No charge for Initial Consultation
Above Fees for Lubbock County only

RUSSELL D. DAVES
Attorney At Law

1111 Main
763-1111

was published on 27 October 1983 in the Lubbock Avalanche Journal. The advertisement and the penalty imposed for its publication are grounded on the controlled practice of law in this state, to which we briefly refer.

Attorneys licensed to practice law in Texas are required to be members of the State Bar of Texas, an integrated bar, which is governed by the State Bar Act and administratively controlled by the Supreme Court of Texas. Tex.Rev.Civ.Stat.Ann. art 320a-1 (Vernon Supp.1985). The legislation provides that any attorney admitted to practice in this state is subject to the disciplinary jurisdiction of the Supreme Court and its administrative agent, the State Bar, *id.* § 12(a), and that from time to time, the Supreme Court may adopt rules and regulations for, among other things, the conduct of the State Bar and the discipline of its members. *Id.*, §§ 8(a), 12(b). In providing for the Court's rule-making powers, the legislation calls for the Court's proposed rules and regulations to be submitted to each registered member of the State Bar for a vote, and specifies that no rule or regulation shall be promulgated if it has not received a majority of the votes cast by at least 51 percent of the registered members who shall have voted in the election. *Id.*, § 8(b).

The Supreme Court adopted the State Bar Rules, characterized as being in aid of the Court's inherent power to regulate the practice of law. Supreme Court of Texas, Rules Governing the State

Bar of Texas, preamble (1984) (appearing in volume 1A of Texas Revised Civil Statutes Annotated at page 70 (Vernon Supp.1985)). Included within the rules, as section 9 of article X, is the Texas Code of Professional Responsibility, which embraces the disciplinary rules, a violation of which empower a district court to impose one or more of these sanctions: (1) a public reprimand, (2) suspension for a fixed period not to exceed three years, (3) disbarment without reinstatement for at least five years, (4) restitution for financial injury, and (5) costs of court and attorney fees. Supreme Court of Texas, Rules Governing the State Bar of Texas, art. X, § 8 (1984).

To promote the availability, accessibility and quality of the service of lawyers to the public in particular fields of law, the State Bar established a plan for, and granted to its created Texas Board of Legal Specialization the general jurisdiction over, the recognition and regulation of specialization in the law. In brief, the plan provides for the issuance of a certificate of special competence in particular fields of law to any lawyer who has actually practiced law on a full-time basis for a minimum of five years, and who demonstrates sufficient knowledge, proficiency and experience in the particular field of law for which certification is sought. One of the fields of law for which standards and requirements for certification have been prescribed is that of family law specialists.

By its 21 July 1982 order, the Supreme Court adopted and promulgated, effective 1 September 1982, a disciplinary rule, DR 2-101, to furnish guidelines for, *inter alia*, attorney advertising without submitting the rule to a vote of the members of the State Bar since two previous referendums on the matter failed because less than 51 percent of the members had voted in the elections. 635-636 S.W.2d (Texas Cases) XLI-XLIII. The rule provides that a lawyer advertising a legal service in an area of law,

> Who has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised must state with respect to each area, "Not certified by the Texas Board of Legal Specialization." Where the area so advertised has not been designated as an

> area in which a lawyer may be awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer may also state, "No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area." Such statements must be displayed conspicuously so as to be easily seen or understood by any consumer.

Id.; Supreme Court of Texas, Rules Governing the State Bar of Texas, art. X, § 9 (Code of Professional Responsibility) DR 2-101(C)(2) (1984).

Following the publication of the advertisement reproduced above, the State Bar of Texas, acting by the Grievance Committee for State Bar District Number 16, instituted these disciplinary proceedings against Daves. The State Bar alleged that the advertisement by Daves constituted professional misconduct in violation of DR 2-101(C), and prayed that he be reprimanded, suspended or disbarred as the facts shall warrant.

Answering, Daves, whose pleadings affirmatively establish that he has been denied a Certificate of Special Competence as a family law specialist by the Texas Board of Legal Specialization, admitted placing the advertisement on or about 27 October 1983 in the Lubbock Avalanche Journal, but he defended his action on the grounds that DR 2-101 is unconstitutional in its entirety or, alternatively, is unconstitutional as applied to his advertisement, which he alleged was constitutionally protected commercial speech. Later, Daves amended his answer to assert that DR 2-101 is invalid by reason of the Supreme Court's failure to submit it to the registered members of the State Bar as required by the State Bar Act.

The State Bar moved for summary judgment on the grounds that Daves' advertisement violated DR 2-101(C) by not containing the required disclaimer of certification. The support recited for the motion was the pleadings.

Daves filed a response to the State Bar's motion for summary judgment, asserting that the State Bar was not entitled to judgment merely because he "has admitted publishing a newspaper advertisement which bears his name and designation as an at-

torney at law and uncontested divorce as an area in which he practices, without stating with respect to the advertised area of law that he was 'Not Certified by the Texas Board of Legal Specialization'" for several reasons. The reasons given to avoid the summary judgment sought were forty-six alleged fact questions and no evidence, as well as insufficient evidence as a matter of law, to support the State Bar's motion. Attached to the response were seven affidavits, remarkedly similar in content, by affiants who stated they had consulted with Daves as a result of the advertisement. The affiants further stated, in short, that they did not find the advertisement to be inherently false, deceptive, misleading, untruthful or to contain any misstatement of fact, and if the advertisement had contained the noncertification statement, they would have assumed Daves had less qualifications than attorneys in general or was not properly licensed or certified to do the advertised work.

Before the date set for a hearing on the summary judgment motion, Daves filed three additional affidavits. One was executed by a lay person following the format of those just mentioned; another was subscribed by an attorney licensed to practice less than five years; and the other was Daves' personal affidavit. In the latter two affidavits, the attorney and Daves, in addition to venturing comments concerning attorney advertising as it relates to the proscriptions of DR 2-101, expressed their legal opinion that the Supreme Court exceeded its legislatively delegated authority by promulgating DR 2-101 and related disciplinary rules without submitting them to a vote of the registered members of the State Bar. Following a hearing on the State Bar's motion, the court, being

> of the opinion that. . . the State Bar of Texas is entitled to summary judgment and the Defendant Russell D. Daves has as a matter of law by his conduct, concerning which there exist [*sic*] no disputed material issue of fact, violated Disciplinary Rule 2-101(C)(2) of the Code of Professional Responsibility, for which reason he should be suspended form the practice of law. . .

ordered, adjudged and decreed that Daves be suspended from the practice of law in Texas for a period of six months.

Appealing, Daves attacks the court's judgment with seven points of error. We first consider his sixth point by which he submits that DR 2-101 is unconstitutional because the Supreme Court promulgated it without submitting it to a vote of the registered members of the State Bar as required by the State Bar Act, article 320a-1, *supra.*

[1-3] As previously noted, the State Bar Act calls for the rules and regulations proposed by the Supreme Court to be submitted to each registered member of the State Bar for a vote, validates an election thereon only if a minimum of 51 percent of the members registered shall have voted at the election, and then provides that:

> No rule or regulation shall be promulgated that has not received a majority of the votes cast in the manner provided above.

Article 320a-1, *supra* § 8(b). Notwithstanding, the Legislature recognized that the State Bar Act

> is in aid of the judicial department's powers under the constitution to regulate the practice of law and not to the exclusion of those powers.

Id., § 2. Given this recognition, the Supreme Court, expressing and exercising its own inherent power to regulate and control the practice of law, entered its 19 June 1979 order specifying that the State Bar shall be governed by the State Bar Act "as supplemented by this order and subsequent orders." 1A Tex.Rev.Civ.Stat.Ann. 53-54 (Vernon Supp.1985). The inherent power referred to is that power given by the present constitution of 1876. *Scott v. State,* 86 Tex. 321, 24 S.W. 789, 790 (1894). Thus, even though the State Bar Act is utilized as an aid in the Court's exercise of its inherent power to regulate and control the practice of law, *State Bar of Tex. v. Heard,* 603 S.W.2d 829, 831 (Tex.1980), the provisions of the Act do not, by the Act's own language, and cannot, by virtue of the Court's inherent power under the Constitution, detract from or limit the Court's primary responsibility to regulate and control the legal profession by its own orders. When a provision of the State Bar Act conflicts with an order of the Supreme Court regulating and controlling the practice of law, the statutory provision must yield to the Court's

rule. *Banales v. Jackson,* 601 S.W.2d 508, 512 (Tex.Civ.App.—Beaumont), *motion to review under Rule 21c denied,* 610 S.W.2d 732 (Tex.1980).

[4] It naturally follows, then, that the Court's exercise of the power inherited from the constitution to promulgate DR 2-101 cannot render the rule unconstitutional merely because its promulgation did not follow a statutory provision enacted as an aid to, but not to the exclusion of, the Court's exercise of its inherent power. In this regard, it should be recognized that the Court did not unilaterally ignore section 8(b) of the State Bar Act as an aid in discharging its responsibility. As recited in its order adopting DR 2-101, the Court had twice submitted the matter of advertising to a vote of the State Bar members, less than 51% of whom voted, but those voting overwhelmingly favored the amendments. 635-636 S.W.2d (Texas Cases) XLI. The sixth point of error is overruled.

We next notice Daves' points of error three, four, five and seven. By this series of points, he advances the central contention that DR 2-101, or at least section (C) thereof, is, and the trial court erred in not finding it to be, an unconstitutional rule that violates commercial free speech protected by the First and Fourteenth Amendments to the United States Constitution. In this connection, Daves argues that his simple advertisement is protected as commercial free speech under the First Amendment by the holding of *Bates v. State of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), and that it is not misleading under the criteria of *In the Matter of R.M.J.,* 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982), so as to be subject to the restraint of the disclaimer required by DR 2-101.

[5-6] At the outset we observe that *Bates* did not foreclose the possibility that some disclaimer might be required in advertising by lawyers to prevent the consumer from being misled, 433 U.S. at 384, 97 S.Ct. at 2709, and *R.M.J.* did not pass on the constitutionality of the disclaimer required for certain lawyer advertising in Missouri, which was not challenged. 455 U.S. at 204, 102 S.Ct. at 938. We further observe that our Supreme Court adopted DR 2-101, and the related rules, as advertising guidelines to

remove the uncertainty and confusion surrounding attorney advertising, solicitation and trade names in the aftermath of *Bates.* 635-636 S.W.2d (Texas Cases) XLI. In this setting, we presume the Court intended DR 2-101, and so fashioned it, to comply with the restraint constitutionally permitted to prevent false, deceptive or misleading advertising.

[7] However, we do not undertake an evaluation of the specific challenges made by Daves to the constitutionality of DR 2-101. Accepting the Supreme Court's inherent power to adopt the rule, it is not our function as an intermediate appellate court to nullify or alter it, for once the Court decides upon a rule of law, the decision is in the absence of a controlling decision by the United States Supreme Court, binding on lower courts, *Swilley v. McCain,* 374 S.W.2d 871, 875 (Tex.1964), until the Court changes the rule. *Woodard v. Texas Dept. of Human Resources,* 573 S.W.2d 596, 598 (Tex.Civ.App.—Amarillo 1978, writ ref'd n.r.e.). This principle is particularly applicable to the Court's rules regulating and controlling the practice of law, *Banales v. Jackson, supra,* the constitutionality of which may be passed on by that Court. *Cameron v. Greenhill,* 582 S.W.2d 775, 777 (Tex.1979). Points three, four, five and seven are overruled.

We now address Daves' first point of error by which he contends that the State Bar was not entitled to judgment as a matter of law. This obtains, he argues, because the State Bar did not establish all of the essential elements of the professional misconduct alleged since it only referred to the pleadings as support for its summary judgment motion, and neither attached summary judgment proof to the motion nor otherwise proved the non-eixstence of the forty-seven fact issues he alleged existed. To support his argument, he cites *City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671 (Tex.1979) and *Americana Motel Inc. v. Johnson,* 610 S.W.2d 143 (Tex.1980), for the principle that pleadings, sworn or unsworn, do not constitute summary judgment proof, *Chandler v. Carnes Co.,* 604 S.W.2d 485 (Tex.Civ.App.—El Paso 1980, writ ref'd n.r.e.), and *Texas Nat. Corp. v. United Systems Internat'l, Inc.,* 493 S.W.2d 738 (Tex. 1973), for the principle that a motion for summary judgment

must be supported by proof attached thereto contained in affidavits in support thereof, and *Wilcox v. St. Mary's University of San Antonio,* 531 S.W.2d 589 (Tex.1975), as well as other cases, for the principle that any doubt as to the existence of a disputed material fact should be resolved in favor of the non-movant.

[8] We recognize the validity of those principles of law and acknowledge their application in the usual summary judgment proceeding, but the principles are not controlling in the light of this summary judgment record. Although, generally, pleadings, even if sworn to, are not summary judgment proof, there are exceptions to that general principle. In certain situations, summary judgment is properly rendered on the pleadings, *Texas Nat. Corp. v, United Systems Internat'l, Inc., supra,* at 741, when, for example, a party pleads himself out of court by pleading facts which affirmatively negate his cause of action, *Texas Department of Corrections v. Herring,* 513 S.W.2d 6, 9 (Tex.1974), or the pleading of a sworn account is not denied by the required oath, *Hidalgo v. Surety Savings and Loan Association,* 462 S.W.2d 540, 543 n. 1 (Tex.1971), or a party pleads facts which constitute a judicial admission entitling the movant to judgment. *Houchins v. Scheltz,* 590 S.W.2d 745, 750 (Tex.Civ.App.—Houston [14th Dist.] 1979, no writ).

[9] To establish the profesional misconduct alleged, the State Bar was required to show conclusively that (1) Daves was not certified as a family law specialist and (2) he published the advertisement *sans* the disclaimer of certification. Daves judicially admitted both facts in his pleadings. The judicial admissions are conclusive upon Daves, relieving the State Bar from the burden to otherwise prove the admitted facts, and barring Daves from disputing them. *Mendoza v. Fidelity & Guar. Ins., Etc.,* 606 S.W.2d 692, 694 (Tex.1980). Thus, these judicial admissions entitled the State Bar to a summary adjudication that Daves was guilty of the professional misconduct alleged, *Houchins v. Scheltz, supra,* without further proof to support that portion of the summary judgment rendered, *Porter v. Lumbermen's Investment Corp.,* 606 S.W.2d 715, 717 (Tex.Civ.App.—Austin 1980, no writ), especially since the rule authorizing summary judgments specifies

that admissions are proper, summary judgment proof. Tex.R.Civ.Pro. 166-A(c).

[10] In holding that the pleadings justified the summary adjudication of professional misconduct, we have not overlooked Daves' contentions that his allegations of forty-seven unresolved fact issues pertaining to the constitutionality of DR 2-101 preclude the adjudication. However, with the acceptance of the binding force of the disciplinary rule on the lower courts, the allegations do no more than advance immaterial fact issues which, as such, will not defeat the motion for summary judgment insofar as it is grounded on professional misconduct. *Borg-Warner Acceptance Corp. v. C.I.T. Corp.*, 679 S.W.2d 140, 144 (Tex.App.—Amarillo 1984, writ rf'd n.r.e.). The first point of error is overruled.

[11] We now reach Daves' second point of error, his contention that the trial court abused its discretion by ordering him suspended from the practice of law for six months upon this record. The State Bar counters that the suspension imposed was within the range of sanctions authorized and, therefore, it cannot be said that the court acted in an arbitrary and unreasonable manner so as to abuse its discretion. The contention and counter-contention present a question of law for decision. *State v. O'Dowd,* 158 Tex.348, 312, S.W.2d 217, 221 (1958).

[12] The parties are agreed that in a disciplinary proceeding, the punishment affixed is a matter for the exercise of the sound discretion of the trial court. *State v. Ingram,* 511 S.W.2d 252, 253, (Tex.1974). The very authorization of a wide range of sanctions for violations of the disciplinary rules contemplates a just discipline for the misconduct committed. As a result, the punishment imposed may be so light, or so heavy, as to constitute an abuse of discretion. *Id.*

To determine the appropriate measure of discipline, it is provided that the trial court, which in its discretion may conduct a separate evidentiary hearing, shall consider, in addition to any other relevant matters, the factors of

> the nature and degree of misconduct for which the respondent is being disciplined, the seriousness and circumstances

> attending the misconduct, assurance that those who seek legal services will be insulated from unprofessional conduct, the profit to the attorney or the injury or hardship to others resulting from the misconduct, avoidance or repetition, the deterrent effect upon others, the maintenance of respect for the honor and dignity of the legal profession, and the conduct of the respondent during the course of the investigation and trial of the disciplinary action. In addition thereto, the disciplinary record of the respondents is admissible on the issue of the appropriate measure of discipline to be imposed.

Supreme Court of Texas, Rules Governing the State Bar of Texas, art. X, § 23(B) (1984).

[13] In this summary judgment proceeding, no separate evidentiary hearing was conducted. Although there are references to other advertisings by Daves, the contents of which are not recorded, the State Bar only alleged, and only proved, the one advertisement reproduced in the forepart of this opinion. None of the other factors to be considered by the trial court was made the subject of the State Bar's summary judgment proof or, apart from the affidavits submitted by Daves, otherwise evidenced for the record. Consequently, and aside from any mitigating influence the affidavits submitted by Daves has on the punishment factors, this summary judgment record shows just one violation of the advertising rule as support for the six-month suspension imposed. On this record, then, our view is that the punishment imposed is so harsh as to constitute an abuse of discretion. As a result, Daves' second point of error is sustained.

It follows that the summary judgment rendered must be, and it is, reversed, and the cause is remanded to the trial court.

APPENDIX C

No. 84-504190

THE STATE OF TEXAS	) IN THE DISTRICT COURT OF
V.	) LUBBOCK COUNTY, TEXAS
RUSSELL D. DAVES	) 237 JUDICIAL DISTRICT

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SUSPENDING DEFENDANT FROM THE PRACTICE OF LAW

On the 24th day of October, 1984, the Court heard the motion for summary judgment filed in this cause by the District 16 Grievance Committee of the State Bar of Texas. The Defendant, Russell D. Daves, appeared in pro se and the Plaintiff, the District 16 Grievance Committee of the State Bar of Texas appeared by and through its counsel, John R. Gladney. The Court, after examining the pleadings and the summary judgment evidence and hearing the arguments of counsel, is of the opinion that the Plaintiff, the District 16 Grievance Committee of the State Bar of Texas is entitled to summary judgment and the Defendant Russell D. Daves has, as a matter of law by his conduct, concerning which there exist no disputed material issue of fact, violated Disciplinary Rule 2-101(C)(2) of the Code of Professional Responsibility, for which reason he should be suspended from the practice of law as hereinafter ordered.

IT IS ACCORDINGLY ORDERED, ADJUDGED, AND DECREED that the Defendant, Russell D. Daves, be SUSPENDED from the practice of law in Texas for a period of 6 months, beginning on February 11, 1985 and ending on August 12, 1985.

It is further ORDERED that the Defendant, Russell D. Daves, during said suspension, is hereby enjoined from practicing law in Texas, holding himself out as an attorney at law, performing any legal services for others, accepting any fee directly or indirectly for legal services, appearing as counsel or in any representative capacity in any proceeding in any Texas court or before any Texas administrative body, or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney at law," "counselor at law," or "lawyer."

It is further ORDERED that the Defendant immediately notify each of his current clients in writing of his suspension, and return to clients all of their property, including unearned fees. Said Defendant is ORDERED to file with this Court within 15 days of the effective date of this judgment an affidavit stating that he has given notice to all of his clients of his suspension and has returned the client's files, property, and unearned fees to them.

IT IS FURTHER ORDERED that the said Russell D. Daves, on or before the 11th day of February, A.D. 1985, surrender his Texas law license and permanent State Bar Card to the clerk of the Supreme Court of Texas.

IT IS FURTHER ORDERED that the Clerk of this Court shall forward a certified copy of the Original Formal Complaint on file herein, along with a copy of this judgment to each Clerk of the Supreme Court of Texas, Supreme Court Building, Austin Texas, 78711, and to the General Counsel of the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

IT IS FURTHER ORDERED that all costs of court herein incurred shall be taxed against the Defendant, Russell D.Daves, for which the Clerk may have his execution if they are not timely paid.

Signed this the 28th day of January, A. D. 1985.

/s/_____

John R. McFall
Judge Presiding.

No. 84-504190

THE STATE OF TEXAS	) IN THE DISTRICT COURT OF
V.	) LUBBOCK COUNTY, TEXAS
RUSSELL D. DAVES	) 237 JUDICIAL DISTRICT

ORDER EXTENDING EFFECTIVE DATE OF SUSPENSION

BE IT REMEMBERED THAT ON THE 4th day of February, 1985, came on to be heard the Motion of Defendant, RUSSELL D. DAVES, to extend the effective date of his suspension from February 11, 1985 until March 1, 1985.

After hearing such Motion, the Court is of the opinion that good cause has been shown for the extension of the effective date of such suspension, and that it would be in the interest of justice and the best interest of the clients of RUSSELL D. DAVES to extend the effective date of the suspension of RUSSELL D. DAVES from the practice of law in Texas in order to allow RUSSELL D. DAVES to wind down his business.

IT IS ACCORDINGLY ORDERED, ADJUDGED, AND DECREED that the Defendant, RUSSELL D. DAVES', effective date of suspension be and is hereby extended from February 11, 1985, until March 1, 1985.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the defendant, RUSSELL D. DAVES, be suspended from the practice of law in Texas for a period of six months, beginning on March 1, 1985, and ending on Spetember 1, 1985.

IT IS FURTHER ORDERED that the said RUSSELL D. DAVES, on or before the 1st day of March, A.D., 1985, surrender his Texas Law License and permanent State Bar Card to the clerk of the Supreme Court of Texas.

IT IS FURTHER ORDERED that the clerk of this Court shall forward a certified copy of this Order Extending Effective Date of Suspension to each Clerk of the Supreme Court of Texas, Supreme Court Building, Austin, Texas, 78711, and to the General Counsel of the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

IT IS FURTHER ORDERED that all provisions of the Order

granting Plaintiff's Motion for Summary Judgment and suspending Defendant from the practice of law entered by this Court on January 28, 1985, be and remain in full force and effect to the extent not in conflict with this Order Extending Effective Date of Suspension.

SIGNED this 5 day of February, A.D., 1985.

/s/_____
John R. McFall
JUDGE PRESIDING

October 30, 1985

APPENDIX D

SUPREME COURT OF THE STATE OF TEXAS

RUSSELL D. DAVES,
APPELLANT

V.

THE STATE BAR OF TEXAS,
APPELLEE

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE JUSTICES OF SAID COURT:

COMES NOW, Russell D. Daves, and hereby gives notice, pursuant to Rule 10, of the Rules of the Supreme Court of the United States, that Russell D. Daves hereby appeals to the Supreme Court of the United States from the judgment and final order of the Supreme Court of Texas entered and issued in this preceding on September 11, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Respectfully submitted,

O'SHEA, HALL & HART
1402 Texas Ave.
Lubbock, TX 79401
(806) 763-4617

/s/_____
John J.C. O'Shea
Attorney for Appellant
State Bar No. 1535000

PROOF OF SERVICE

I, John J.C. O'Shea, attorney for Russell D. Daves, Respondent-Appellant herein, hereby certifies that all parties required to be served by Rule 28 of the Rules of the Supreme Court of the United States have been served, specifically, on the 25 day of October, 1985, I served a copy of the foregoing notice of appeal to the Supreme Court of the United States, by mail, first class, postage prepaid, on Adele Winn, Assistant General Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX 78711, and on Jim Maddox, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas, pursuant to 28 U.S.C. § 2403 (b).

/s/_____
John J.C. O'Shea

CAUSE NO. 07-85-0049-CV

IN THE
COURT OF APPEALS
FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF
TEXAS
AMARILLO, TEXAS

RUSSELL D. DAVES,
APPELLANT

V.

THE STATE BAR OF TEXAS,
APPELLEE

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE JUSTICES OF SAID COURT:

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Respectfully submitted,

O'SHEA, HALL & HART
1402 Texas Ave.
Lubbock, TX 79401
(806) 763-4617

/s/_____
John J.C. O'Shea
Attorney for Appellant
State Bar No. 1535000

PROOF OF SERVICE

I, John J.C. O'Shea, attorney for Russell D. Daves, Respondent-Appellant herein, hereby certifies that all parties required to be served by Rule 28 of the Rules of the Supreme Court of the United States have been served, specifically, on the 25 day of October, 1985, I served a copy of the foregoing notice of appeal to the Supreme Court of the United States, by mail, first class, postage prepaid, on Adele Winn, Assistant General Counsel, State Bar of Texas, P.O. Box 12487, Austin, TX 78711, and on Jim Maddox, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas, pursuant to 28 U.S.C. § 2403 (b).

/s/_____
John J.C. O'Shea

Supreme Court, U.S.
FILED
DEC 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-787

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

RUSSELL D. DAVES,
APPELLANT

V.

THE STATE BAR OF TEXAS,
APPELLEE

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION TO DISMISS OR AFFIRM

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ADELE M. WINN
ASSISTANT GENERAL COUNSEL

BEST AVAILABLE COPY

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No. 85-787

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

RUSSELL D. DAVES,
APPELLANT

V.

THE STATE BAR OF TEXAS,
APPELLEE

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Texas on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE RULE INVOLVED AND THE NATURE OF THE CASE

A. THE RULE

This appeal concerns the validity of Disciplinary Rule 2-101(C) of the Rules Governing the State Bar of Texas reprinted in 1A Tex.Rev.Civ.Stat.Ann. Title 14 App. art 10 §9 (Vernon Supp. 1985) [hereinafter, DR 2-101(C)]. The text of DR 2-101(C) appears on page 3 of Appellant's Jurisdictional Statement. DR 2-101(C) requires that Texas attorneys who advertise their availability to perform legal services in a particular area of law must state whether they have received Certificates of Special Competence in those areas from the Texas Board of Legal Specialization.

The State of Texas has an organized program of specialization certification by application and examination.

The Texas Board of Legal Specialization was established by the State Bar of Texas to administer a program for recognition and regulation of specialization

in the law. The Board promulgates standards for qualification for a certificate of special competence in particular fields of law. These standards include a minimum length of time in the full-time practice of law, educational experience, examinations and a showing of substantial involvement in the field. The State Bar of Texas Plan for Recognition and Regulation of Specialization in the Law is contained in the Appendix of this Brief. Application to the Board for certification is voluntary. Thus, a certificate of special competence indicates expertise in an area of law and a requirement that lawyers publish information regarding certification is a means of informing the public of an attorney's expertise as measured by objective standards.

B. THE PROCEEDINGS BELOW

Appellant admitted in his answer to the trial court that he had placed a newspaper advertisement which stated that he performed uncontested divorces but did not include information as to his certification by the Texas Board of Legal Specialization as required by DR 2-101(C). Based upon Appellant's admission, Appellee filed a motion for summary judgment which was granted.

Appellant maintained in the trial court on appeal that DR 2-101(C) infringed upon his First Amendment rights. In his appeal to the Seventh Court of Appeals, Mr. Daves also argued that imposition of a six-month suspension was abuse of discretion. The Court of Appeals found that liability was clearly established but agreed with Mr. Daves' contention that the sanction was too harsh. The Court ordered the case remanded for a new trial.

Mr. Daves appealed to the Supreme Court of Texas, again urging that DR 2-101(C) is unconstitutional. Both parties fully briefed the issue. The Supreme Court of Texas disposed of Appellant's application for writ of error by ordering that it was refused with the notation, No Reversible Error. Appellant would have this Court believe that the Texas Supreme Court's action in this case is equivalent to the refusal of a writ of certiorari by this Court. This assertion that the Supreme Court of Texas did not consider this appeal is untrue. While no opinion was issued in connection with the Texas Supreme Court's decision, its significance can be determined by reference to Tex. R. Civ. P. 483 which provides in pertinent part, "In all cases where the Supreme Court is not satisfied that the opinion of the Court of Appeals in all respects has correctly declared

the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application with the notation 'Refused. No Reversible Error.'" Since the constitutionality of DR 2-101(C) is a dispositive issue in this case, the Supreme Court of Texas could not have ruled that there was "no reversible error" without passing upon this issue and finding that the rule is constitutional.

II.

ARGUMENT

This Case Presents No Substantial Question Not Previously Decided By this Court

Appellant admits that in the past eight years, this Court has addressed the issue of attorney advertising on several occasions. The decisions of this Court constitute a well developed body of law which clearly governs the case at bar.

Therefore, there is no substantial question to be decided by this Court. If the Court were to decide this case, the principles set forth in prior decisions would mandate an affirmance.

Attorney advertising is "commercial speech." Zauderer v. Office of Disciplinary Counsel, ____ U.S. ____, 105 S.Ct. 2265, 2275 (1985). Commercial speech is entitled to First Amendment protection but may be regulated by the states and federal government when a four prong test is met. That test, which was first set forth in Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980), is applicable to attorney advertising cases. See Zauderer v. Office of Disciplinary Counsel, ____ U.S. ____, 105 S.Ct. 2265 (1985); In Re R.M.J., 455 U.S. 191 (1982).

In applying the test set forth in Central Hudson for valid regulation of commercial speech, a court must answer the following questions:

1. Whether the speech concerns lawful activity and whether it is misleading.

2. Whether the asserted governmental interest is substantial.

3. Whether the regulation directly advances the governmental interest asserted.

4. Whether the regulation is more extensive than necessary to serve that interest.

While the state must satisfy all four prongs of the Central Hudson test when it seeks to prohibit speech, a less rigorous standard is employed when the state requires the inclusion of particular information in advertisements. The state need not show that its rule is

the least restrictive means of preventing consumer deception but that the disclosure requirements are reasonably related to the state's interest in preventing deception. Zauderer v. Office of Disciplinary Counsel, ____ U.S. ____, 105 S.Ct. 2265, 2282 (1985).

In attorney advertising cases, this Court has further defined the first element of the Central Hudson test: it is not whether the advertisement is misleading but whether the advertising is inherently likely to deceive or mislead. In Re R.M.J., 455 U.S. 191, 201 & 202 (1982).

The decisions of this Court clearly establish that in a case involving a disclosure requirement such as this one, the proper analysis is to determine whether the speech in question is likely to mislead, whether the state has a substantial interest in regulating it and

whether the state's regulation is reasonably related to the state's interest.

Potentially Misleading Nature of the Advertisement

Contrary to the statement in Appellant's brief, the issue of the potentially misleading nature of an advertisement such as his was not decided in his favor in Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

In that case, this Court was presented with three arguments against attorney advertising. The opponents of advertising contended that it would mislead the public "(a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement, (b) because the consumer of legal services is unable to determine in advance just what services

he needs, and (c) because advertising by attorneys will highlight the irrelevent factors and fail to show the relevant factor of skill," Bates, supra at 372. In addressing the first argument, the Court stated that advertising the prices for routine legal services such as uncontested divorces, does not make the advertising misleading so long as the attorney does the necessary work at the advertised price. Bates, supra at 372-73. When viewed in context, it can be seen that the Court was not giving blanket approval to this form of advertising but was restricting itself to considering whether mentioning prices was misleading considering the unique and varied nature of legal work. Thus, this portion of the Bates opinion did not address the issue in this case, which is whether an attorney's advertisement listing a specific legal service is likely to

mislead the public with respect to that attorney's level of expertise.

The third argument against attorney advertising in Bates did involve the question of expertise. The Court admitted that this argument was not without merit. Rather than suppress all advertising for failing to provide a complete foundation on which to select an attorney, the Court determined that the better course would be to permit advertising, noting that, "of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture . . ." Bates, supra at 375. In view of the Texas program of certification of specialists, the requirement of DR 2-101(C) does no more than Bates required.

It is the position of the Supreme Court of Texas that advertising as to specific areas of law is likely to

mislead the public as to the level of a lawyer's expertise and therefore, it has promulgated DR 2-101 to require lawyers to provide information necessary to present an accurate picture. Other courts have agreed with this view. See Lovett and Linder, Ltd. v. Carter, 523 F.Supp. 903, 911 (D.R.I. 1981); Durham v. Brock, 498 F.Supp. 213, 223 (M.D. Tenn. 1980) aff'd 698 F.2d 1218 (6th Cir. 1982); In Re Johnson, 341 N.W.2d 282, 285 (Minn. 1983).

Appellant also argues that his advertisement could not be misleading because it contained no inaccurate statements of fact. In Zauderer, the attorney's advertisement stated that "if there is no recovery, no legal fees are owed by our clients." Zauderer v. Office of Disciplinary Counsel, ____ U.S. ____, 105 S.Ct. 2265, 2283 (1985). In itself, this was not an inaccurate statement.

However, this Court held that Ohio could require Mr. Zauderer to disclose that clients will have to pay costs even if their suits are unsuccessful. Id. The Court reasoned that consumers would be misled because they would not understand the difference between costs and fees. Thus, there is no requirement that there be inaccurate statements in commercial speech in order to regulate. As stated above, the test is whether the advertisement is likely to mislead. In R.M.J., 455 U.S. 191, 201 and 202 (1982); Durham v. Brock, 498 F.Supp. 213, 220 (M.D. Tenn. 1980) aff'd 698 F.2d 1218 (6th Cir. 1982).

Appellant argues that requiring the statement concerning Board Certification is unjustified because there should be a general presumption that all attorneys are competent to handle uncontested divorce cases. This argument miscon-

strues the issue, which is not whether all licensed attorneys are competent to obtain divorces or whether the public should presume that all attorneys are competent to do so. The issue is whether the public will perceive attorneys who advertise specific legal services as being highly skilled in the performance of those services. That the potential exists for some members of the public to form such an impression is self-evident: it is only logical to conclude that attorneys who list a specific service must be especially knowledgeable about that service.[1]

The State Bar contends that Mr. Daves' advertisement is likely to mislead the public as to his level of expertise.

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[1]Mr. Daves appears to be taking the position that the Board certification statement is especially unnecessary when

Substantial State Interest in Regulation

In Zauderer, the Court stated that the principal justification for extending

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the legal service advertised is to obtain uncontested divorces because performing that service requires very little skill. This characterization is incorrect. In all divorces, attorneys must draft a decree which disposes of the couple's property and sets forth child support obligations and visitation rights. Obviously, attorneys with greater knowledge of community property, taxation and family law will be better able to produce a decree which is both tailored to the clients' needs and is enforceable. Considering that in only 28% of cases involving child support orders are those obligations being met, enforceability is very important.

Mr. Daves' argument regarding skill in handling uncontested divorces overlooks another fact: that very often the parties disagree over some issue before the divorce is granted and the proceeding becomes adversary in nature. Unless the attorney plans to abandon such clients, he or she must possess all the skills necessary to try the case.

First Amendment protection to commercial speech is to provide consumers with information. Zauderer v. Office of Disciplinary Counsel, ___ U.S. ___, 105 S.Ct. 2265, 2282 (1985). The United States Supreme Court has recognized that the factor of skill is the information which the public should learn to assist them in their choice of an attorney. Bates v. State Bar of Arizona, 433 U.S. 350, 377 (1977). This Court also stated, "The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the "product" renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling." In Re R.M.J., 445 U.S. 191, 202 (1982). Thus, it is clear that Texas has sufficient interest to require that attorneys include infor-

mation about their expertise in their advertisements.

Reasonable Relationship of State's Interest to Disclosure Requirement

In determining whether there is a rational relationship between a regulation and the achievement of a legitimate state purpose, the Court must answer two questions: 1) does the regulation have a legitimate state purpose? and 2) was it reasonable for the lawmakers to believe that the regulation would promote that purpose. W. & S. Life Insurance Co. v. State Board of Equalization, 451 U.S. 666, 669 (1981). The legitimacy of the state purpose in promulgating DR 2-101(C) has been demonstrated in the previous section of this brief. As to the second part of the test, it does not require that the regulation be perfect, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 316 (1976) or that

the regulation be completely successful in accomplishing the stated goals. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).

Thus, the question is whether the Texas Supreme Court, in promulgating DR 2-101(C), could have reasonably believed that this rule would result in preventing the public from being misled about the expertise of advertising lawyers. DR 2-101(C) requires that an attorney who advertises in a specific area of law report an objective fact: whether he is certified by the Texas Board of Legal Specialization. Clearly, Board certification qualifies a practitioner as an expert in that particular field. As established earlier, this is the type of information which will be useful to members of the public in their selection of an attorney. It is also information which an attorney already knows about himself.

Therefore, as a practical matter, complying with the disclosure requirement poses no great difficulties. There is a reasonable relationship between the goal of giving the public an accurate impression of an advertising lawyer's expertise and DR 2-101(C).

Mr. Daves contends that the rule in question will not accomplish the stated objective, but will lead the public to the erroneous conclusion that attorneys who are not Board certified are unqualified. He further states that DR 2-101(C) will inevitably result in a sharp decline in advertising and in cost competition.

Mr. Daves is speculating about the effect of the disclaimer. An equally plausible conclusion would be that people who want inexpensive divorces will seek out attorneys who are not certified because they will believe that those attorneys will charge lower fees.

The scenario described by Mr. Daves is illogical and is not in fact what is occurring in Texas. This can be seen by comparing the relative number of Board certified attorneys with those who are not and by observing the number of attorney advertisements in Texas since the promulgation of DR 2-101(C).

As of September of 1985, fewer than 7% of Texas lawyers were certified by the Texas Board of Legal Specialization in the nine areas in which certification is available. The Texas Lawyer, at 1 (September 11, 1985). The percentage of lawyers certified as family law specialists is less than 1%. Id. If the lawyers in each category chose to advertise in proportion to their relative numbers, ninety-three out of one hundred advertisements would be those of non-Board certified lawyers and ninety- nine out of hundred would be those of lawyers who are

not certified in family law. Although there are no figures available on the number of lawyers in each category who do advertise, a quick glance though the Yellow Pages of any Texas city reveals that there are far more non-certified lawyers advertising than there are certified lawyers. It is unreasonable to conclude that consumers would believe that only the few Board certified lawyers are competent and that all the rest are unqualified. Looking through the Yellow Pages of the past three years will also reveal that since the promulgation of DR 2-101(C), lawyer advertising has increased, and that the increase is attributable to non-certified as well as certified lawyers.

Mr. Daves has chosen to characterize what is obviously a disclosure requirement as a prohibition on speech. The truth is that DR 2-101(C) requires that

attorneys who advertise convey a single fact to the public. It is apparent that complying with the rule is not burdensome. There is no prohibition on the inclusion of additional information regarding education and other qualifications. Tex. Professional Ethics Comm. Op. 418 published in 47 Tex. B.J. 1118 (October 1984). Thus, the Texas rule does not prohibit speech, but encourages it, thereby providing the public with a means of making a well informed choice in their selection of an attorney.

CONCLUSION

This Court's prior decisions clearly set forth the test to be employed in determining whether a state may permissibly require attorneys to disclose information in their advertisements. Therefore, there is no substantial federal question before the Court in this case. Using that test to evaluate the rule in ques-

tion leads to the conclusion that it does not infringe upon attorneys' First Amendment rights.

WHEREFORE, PREMISES CONSIDERED, this appeal should be either dismissed or affirmed. If the Court determines that an appeal is not proper in this case and treats it as a petition for writ of certiorari, the petition for writ of certiorari should be denied for the reasons stated herein.

Respectfully submitted,

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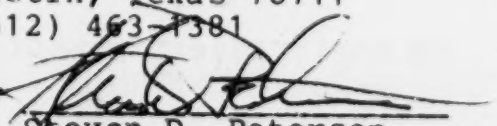
By 
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COUNSEL OF RECORD
FOR APPELLEE

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Motion to Dismiss or Affirm has been served on David Vladeck, Public Citizen Litigation Group, Suite 700, 2000 P Street, N.W., Washington, D.C. 20036, by delivery of three true and correct copies to him by certified mail, return receipt requested, on the 11th day of December, 1985.

Steven D. Peterson

STATE BAR OF TEXAS

TEXAS PLAN FOR RECOGNITION AND REGULATION

OF

SPECIALIZATION IN THE LAW

[redacted]

APPENDIX

TEXAS PLAN FOR RECOGNITION AND REGULATION OF SPECIALIZATION IN THE LAW

I.
Purpose and Objective

To promote the availability, accessibility and quality of the services of lawyers to the public in particular fields of the law is to serve the public interest and advance the standards of the legal profession. That is the purpose and objective of the following program for the recognition and regulation of those lawyers who have special competence in a particular field of the law.

II.
Texas Board of Legal Specialization

The State Bar of Texas hereby establishes a Texas Board of Legal Specialization (hereinafter referred to as the "Board"). The Board shall be composed of nine members appointed by the President of the State Bar of Texas, with the approval of its Board of Directors. The Board shall be representative of the legal profession in Texas and shall consist only of licensed lawyers, some of whom specialize and some of whom are in general practice. All members shall hold office for three years and until their successors are appointed. Members shall be appointed to staggered terms of office, and the initial appointees shall serve as follows: three members shall serve until the June 30 next following their appointment; three members shall serve until the second June 30 following their appointment; and three members shall serve until the third June 30 following their appointment. Any vacancy shall be filled in the manner provided for original appointments. All members of the Board shall be eligible for reappointment but for no more than one additional term.

III.
Jurisdiction of the Board

Subject to the continuing jurisdiction of the Board of Directors of the State Bar of Texas, the Board shall have general jurisdiction of all matters pertaining to specialization in the practice of law and shall have the authority and duty to:

A. Administer the program for the recognition and regulation of specialization in the law.

B Upon appropriate petition, define and designate fields of law in which certificates of special competence may be granted and provide procedures by which such fields may be determined, redefined or eliminated.

C Make and publish reasonable and nondiscriminatory standards concerning education, experience, proficiency, and other relevant matters for granting certificates of special competence to lawyers in defined and designated fields of law, after public hearings on due notice have been held.

D Provide procedures for the investigation and testing of the qualifications of applicants and certificate holders and to award certificates of special competence in a form approved by the Board.

E. Make and publish reasonable and nondiscriminatory standards for continuing proficiency, recertification or renewal of certificates of special competence after public hearing on due notice.

F Encourage law schools, the State Bar Committee on Continuing Legal Education, local bar associations and other agencies of continuing legal education to develop and maintain a program of legal education and continuing legal education to meet the standards prescribed by the Board.

G. Cooperate with other agencies of the State Bar of Texas in establishing and enforcing standards of professional conduct necessary for the recognition and regulation of specialization in the law in the manner determined by the Board.

H. Cooperate with the Special Committee on Specialization of the American Bar Association and with the agencies in other states engaged in the regulation of legal specialization.

I. Report as required, but at least annually, to the Board of Directors of the State Bar and to advise such Board concerning the appointment of advisory commissions.

J. Make and publish standards, rules and regulations to implement this authority, all in accordance with the limitations on the power of the Board and the minimum standards prescribed by the Board.

IV.
Limitations on Power of the Board

The following limitations on the power of the Board are established:

A. No standard shall be approved which shall in any way limit the right of a certificate holder to practice law in all fields. Any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he is certified in a particular field of law.

B. No lawyer shall be required to be certified before he can practice law in any particular field of the law. Any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he is not certified as a specialist in any particular field.

C. All requirements for and all benefits to be derived from certification are individual and may not be fulfilled by or attributed to a law firm of which the specialist may be a member.

D. Participation in the plan shall be on an entirely voluntary basis.

E. The limit on the number of fields of law in which a lawyer may be certified shall be determined by such practical limits as are imposed by the requirement of "substantial involvement" and such other standards as may be established by the Board.

F. No rules or standards shall be adopted in contravention of the rules of the State Bar of Texas.

V.
Advisory Commissions

Advisory Commissions to the Board shall be established for each field of law in which certificates of special competence are to be issued. These commissions shall advise and assist the Board in carrying out its objectives and in the conduct and development of the program for the recognition and regulation of specialization in law. Standards for the issuance of certificates of special competence shall be established by the Board, but it will be advised in this and other relevant matters by the advisory commission for each field of law. The advisory commission for each field of law shall be charged with actively administering the program in its particular field in cooperation with and under the general policy guidance of the Board.

Members of the advisory commission shall be appointed by the Board in such number and for such terms as the Board shall direct.

A lay person advisory commission to the Board shall be established composed of nine members appointed by the Board of Directors of the State Bar of Texas. Such commission shall have equal status with other advisory commissions so that the Texas Board of Legal Specialization shall receive formal input as to the public's legal needs and how the public can be served through the specialization program.

VI.
Minimum Standards for Certification

The minimum standards for certification under this program are prescribed below. Each advisory commission may recommend, and the Board may establish, additional or higher standards.

A lawyer (1) who is an active member in good standing of the State Bar of Texas; and (2) who currently maintains an office in the State of Texas; and (3) who meets the requirements prescribed by the Board, shall be granted a certificate in a form approved by the Board which shall certify, under the name of the Board, the lawyer's special competence in a particular field of law designated by the Board as a field of law in which certificates of special competence may be granted.

A. Requirements for qualifying for certification without examination are:
   1. A minimum of ten (10) years of actual practice of law on a full time basis.
   2. A satisfactory showing, as determined by the Board after advice from the appropriate advisory commission, of special competence and substantial involvement in the particular field of law for which certification is sought during a continuous five-year, or other reasonable period, (but not less than three years) immediately preceding certification.
   3. Payment of any fees required by the Board.

   Certification without examination may be granted only within a period of two years after the date on which the plan for certification of a particular field of law is made effective by the Board.

B. Requirements for qualifying for certification by examination are:

1. A minimum of five years of actual practice of the law on a full time basis.
2. A satisfactory showing, as determined by the Board after advice from the appropriate advisory commission, of a substantial involvement in the particular field of law for which certification is sought for such reasonable period of time immediately preceding certification as may be determined by the Board after advice from the appropriate advisory commission.
3. A satisfactory showing, as determined by the Board after advice from the appropriate advisory commission, of such educational experience in the particular field of law for which certification is sought as the Board deems advisable.
4. Passing a written examination applied uniformly to all applicants before certificaton to demonstrate sufficient knowledge, proficiency and experience in the field of law for which certification is sought and in the various fields of law relating to such field as is necessary to justify the representation of special competence to the legal profession and to the public.
5. Passing an oral examination, if determined to be advisable by the Board, with the advice of the appropriate advisory commission.
6. Payment of any fee required by the Board.

"Substantial involvement", as used in these standards, shall be defined by the Board as to each particular field of law from a consideration of its complexity and distinction from other fields, and from consideration of the time and extent of necessary devotion to the particular field of practice.

VII.
Standards for Recertification

No certificate of special competence shall be issued or renewed for a period longer than five years, and the term of any certificate shall be stated on its face.

Each advisory commission may recommend, and the Board may establish additional requirements and safeguards to insure

the continued proficiency of any holder of a certificate of special competence, but recertification shall be required at least every five years under the following minimum standards:

A. A satisfactory showing, as determined by the Board with the advice of the appropriate advisory commission, of a substantial involvement in the particular field of law for which certification was granted, during the period of certification,

B. A satisfactory showing, as determined by the Board after advice from the appropriate advisory commission, of such continuing educational experience in the field of law for which certification was granted, during the period of certification as the Board deems advisable, and

C. The payment of any fee prescribed by the Board. In the event a lawyer's previous certificate is not effective at the time application is made for recertification or he fails to meet the requirements for recertification, he shall be entitled to seek certification by examination as provided in Section VI above.

VIII.
Revocation of Certification

A certificate of special competence may be revoked by the Board if the program for certification in that field is terminated or if it is determined after hearing on appropriate notice that:

A. The certificate was issued contrary to the rules and regulations of the Board of the State Bar of Texas, or

B. The certificate was issued to a lawyer who was not eligible to receive a certificate or who made any false representation or misstatement of material fact to the Board, or

C. The certificate holder has failed to abide by all rules and regulations covering the program promulgated by the Board as amended from time to time including any requirement or safeguard for continued proficiency, or

D. The certificate holder has failed to pay any fee established by the Board, or

E. The certificate holder no longer meets the qualifications established by the Board.

Upon revocation of the certificate, the certificate holder shall immediately return the certificate to the office of the Executive Director.

IX.
Right of Appeal

A lawyer who is refused certification, recertification or whose certificate is revoked by the Board, or any person who is aggrieved by a ruling or determination of the Board, shall have the right to appeal the ruling of the Board to the Board of Directors of the State Bar of Texas under such rules and regulations as it may prescribe. The exhaustion of this right of appeal shall be a condition precedent to judicial review.

X.
Responsibilities of Certified Lawyers

A. When a client is referred to a lawyer who is certified under this program on a matter within the lawyer's specialty field, the lawyer so certified shall not take advantage of his position to enlarge the scope of his representation. In addition to any requirements of the Canons of Ethics, the lawyer so certified shall encourage a referred client to return to the referring lawyer for the handling of future legal needs.

B. Special Controls for Program.
   1. Each participant in the program, as a part of the application for participation in the program, shall agree to abide by all rules and regulations promulgated by the Board covering the program as amended from time to time.
   2. During the operation of the program, no individual lawyer or group of lawyers shall have any vested rights thereunder.

C. Rules of Professional Conduct
   During the operation of this program, any lawyer holding a current certificate of special competence shall be entitled to the following:
   1. To state in recognized and conventional legal directories or law lists that the lawyer is certified by the Board in a particular field in the following words: "Board Certified (e.g., Labor Law) — Texas Board of Legal Specialization". In all other respects the listing shall conform to the present rules of the State Bar of Texas, including the Canons of Ethics.
   2. To state in a notice mailed to lawyers, clients, former

clients, personal friends and relatives that the lawyer is certified by the Board in a particular field in the following words: "Board Certified (e.g., Family Law) — Texas Board of Legal Specialization". In all other respects the listing shall conform to the present rules of the State Bar of Texas, including the Canons of Ethics.

3. To state in the classified section of telephone directories that the lawyer is certified by the Baord in a particular field in the following words: "Board Certified (e.g., Criminal Law) — Texas Board of Legal Specialization". In all other respects the listing shall conform to the present rules of the State Bar of Texas, including the Canons of Ethics.
4. To state on a professional card that the lawyer is certified by the Board in a particular field in the following words: "Board Certified (e.g., Civil Trial Law) — Texas Board of Legal Specialization". Said information is also permitted on the letterhead under the individual listing of the attorney on the margin of the stationery, but not under the styled name of the firm at the top of the letterhead. In all other respects the listing shall conform to the present rules of the State Bar of Texas, including the Canons of Ethics.
5. To display in the lawyer's office the certificate issued by the Board.

No statement of certification shall be permitted other than as above specifically described unless permitted by the rules of the State Bar of Texas, including the Canons of Ethics.

XI.
Financing of the Program

A fee as established by the Board shall be charged for filing an application for certification or recertification. An additional fee may be established by the Board for the granting of the certificate payable in annual installments or in other manner determined by the Board. Said fees shall be reasonable and in an amount as may be necessary to defray the expense of administering the program, and may be adjusted from time to time.

XII.

Retained Jurisdiction of Supreme Court

The jurisdiction of the Board shall be limited to ten fields of law: Criminal Law, Labor Law, Family Law, Estate Planning and Probate Law, Civil Trial Law, Personal Injury Trial Law, Immigration and Nationality Law, Real Estate Law, Tax Law, and Consumer Bankruptcy Law and to the development and operation of the program in the recognition and regulation of specialization in the law, provided, however, that the number and type of fields included in the program and the jurisdiction of the Board may be enlarged, altered, or terminated from time to time by the Supreme Court of Texas.

DISTRIBUTED

DEC 27 1985

Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-787

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

RUSSELL D. DAVES,
APPELLANT

V.

THE STATE BAR OF TEXAS,
APPELLEE

ON APPEAL FROM THE
SUPREME COURT OF TEXAS

SUPPLEMENTAL BRIEF

COUNSEL OF RECORD:

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No. 85-787

IN THE
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RUSSELL D. DAVES,
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V.

THE STATE BAR OF TEXAS,
APPELLEE

ON APPEAL FROM
THE SUPREME COURT OF TEXAS

SUPPLEMENTAL BRIEF

This brief is a supplement to Appellee's Motion To Dismiss Or Affirm.

Appellant claims that the No Reversible Error denial of his writ application is meaningless, and that the Supreme Court of Texas has not passed on the constitutionality of the advertising disclosure requirement at issue in this case.

It is with regard to the significance of the "n.r.e." refusal that this supplemental brief is submitted.

Subsequent to the filing of Appellee's motion to dismiss or affirm, an article appeared which supports Appellee's point that the constitutionality of the disclosure rule has been assessed and approved by the Supreme Court of Texas.

"The 'N.R.E.' stamp is in every sense a decision on the merits of the appeal.[6]" Judge Ted F. Robertson and James W. Paulsen, The Meaning (If Any) of an "N.R.E.," 48 Texas Bar Journal 1306 (Dec. 1985).

Footnote six, cited in the text reads,

> A good argument could be made from the language of subdivision 6 of art. 1728 that an "N.R.E." is "jurisdictional," since the statute provides:

> "The Supreme Court shall have appellate jurisdiction ... in any other case in which it is made to appear that an error of substantive law has been committed by the Court of Appeals which affects the judgment...." Tex. Rev. Civ. Stat. Ann. art. 1728 (Vernon Supp. 1985) (emphasis added). Whether "jurisdictional" or not, however, an "N.R.E." necessarily evidences some judgment on the merits of the appeal. Chief Justice McClendon of the Austin Court of Civil Appeals, speaking at a time when "Dismissed" could be the equivalent of an "N.R.E." today, explained it thus: "The Supreme Court had potential jurisdiction ... of the case upon that appeal .... Therefore the effect of the dismissal order constituted an adjudication by that court that the judgment of this court was "a correct one." Fisher v. City of Bartlett, 88 S.W.2d 1068, 1069 (Tex. Civ. App. -- Austin 1935, writ dism'd).

The full text of the article can be found in the cited issue of the Texas Bar Journal, available in the U.S. Supreme Court Library.

Respectfully submitted,

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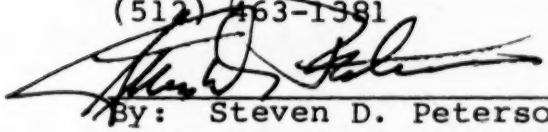

By: Steven D. Peterson
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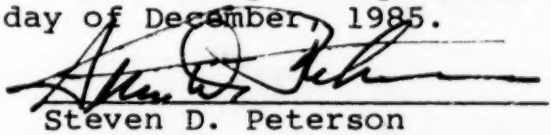
CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Supplemental Brief has been served on David Vladeck, Public Citizen Litigation Group, Suite 700, 2000 "P" Street, N.W., Washington, D.C. 20036, by delivery of three true and correct copies to him by certified mail, return receipt requested, on the 20th day of December, 1985.



Steven D. Peterson